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Criminal Law: Betting: Unlawful Wager: Withdrawal of Wager.—

Though every one is presumed to know the law, it may be a surprise to some to know that betting on the result of an election has been a crime in California since 1872.¹ This section of the Penal Code was recently applied in the case of *Schenck v. Hirshfeld*.² Not only are the wagering parties guilty of a crime, but under section 659³ of the Penal Code, the stakeholder is also guilty of a misdemeanor because he "aids another in the commission of a misdemeanor." At common law betting was not a crime, and in this state, until 1911, the only wagering that was made criminal by statute was betting on the result of an election and on certain forbidden games of chance.⁴ In 1911, however, subdivision six of section 337a of the Penal Code was passed. It provides that every person who lays any bet, or wager, upon the result of any trial or contest of skill, speed or power of endurance is guilty of a crime.⁵ In the case of *People v. Plath*,⁶ the Supreme Court holds that this subdivision "apparently makes the ordinary bet or wager between two individuals on the result, say, of a horse race or a baseball game, a crime." The language of this subdivision would also seem to be broad enough to make betting at card games, or any game of chance involving skill, a crime. It apparently does not forbid betting on mere events, as a wager that it will rain tomorrow, nor betting on games of chance in which no skill is involved, as in shaking dice.

Curiously enough, however, subdivision three of this section,⁷ which relates to the stakeholder of a bet or wager, does render him guilty of a crime in holding stakes on bets or wagers on mere events or in games of chance involving no skill. Inasmuch as each subdivision of this section has been held to create a separate and independent offense,⁸ we have the anomaly of the stakeholder's being guilty of a crime for the mere receiving of a bet, though the actual betting itself is not a crime. However, the wagering parties are guilty in this case for the same reason that the stakeholder was guilty in the *Schenck* case,⁹ that is, as accessories in the commission of a crime.¹⁰ The effect of the whole section would, therefore, seem to be to make all betting a crime where the parties have a stakeholder, but not to forbid betting on mere events and games of chance involving no skill where a stakeholder is not employed.

The importance of the statute, however, probably does not lie in the number of convictions that will occur under it, but in its effect

¹ Penal Code (Cal.) sec. 60.

² *Schenck v. Hirshfeld*, (September 19, 1913) 17 Cal. App. Dec. 286.

³ Penal Code (Cal.) sec. 659.

⁴ Penal Code (Cal.) sec. 330.

⁵ Statutes, 1911, p. 4.

⁶ *People v. Plath*, (September 30, 1913) 46 Cal. Dec. 293.

⁷ Penal Code (Cal.) sec. 337a, subdivision 3.

⁸ *People v. Plath*, (September 30, 1913) 46 Cal. Dec. 293.

⁹ *Schenck v. Hirshfeld*, (September 19, 1913) 17 Cal. App. Dec. 286.

¹⁰ Penal Code (Cal.) secs. 659, 971.

on the recovery of wagers by a party who "repents" before the event happens and demands back his wager. Under such circumstances, where the betting is not a crime, the repentant party may maintain an action to recover the money.¹¹ Since the effect of the various subdivisions of the statute is to make all betting where a stakeholder is employed a crime, and in other cases to prohibit betting in all but the comparatively few instances mentioned above, the result will be a great decrease in the number of cases in which the Court will aid a repentant party in the recovery of his wager.

T. J. L.

Criminal Law: Jeopardy; Illness of Judge.—When a judge is taken ill during the trial of a criminal case and becomes unable to proceed, the usual course is to discharge the jury. The defendant can be tried again, since the failure to return a verdict in the former trial is due to an unavoidable cause.¹ If, however, on the illness of a judge, the defendant is willing to have another judge called in and proceed with the same trial, there is no reason why this course should not be pursued. In fact unless the record shows that the defendant objected to the substitution of judges, error will not be presumed.² It is true that the judge who is called in after the trial has progressed for some time is not in such a good position to rule on the evidence or pass on the motion for a new trial, but these difficulties may be obviated to a certain extent by recalling the witnesses or reading the testimony to the judge. As a choice of evils a continuation of the trial before the same jury and another judge would seem in general preferable to a new trial. So it must have appeared to the legislature when in 1911 it provided for the substitution of a judge even without the defendant's consent.³ The statute, however, is clumsily worded and in counties where there is more than one judge, seems to require the calling in of a judge from the same county. In the principal case⁴ on the illness of the judge presiding at the trial in the City and County of San Francisco the parties stipulated to call in a judge from another county. It was properly held that the compulsory procedure of section 1053 of the Penal Code did not prevent the parties from following a different method by stipulation.

A. M. K.

¹¹ *Gridley v. Dorn*, (1880) 57 Cal. 78; *Schenck v. Hirshfeld*, (September 19, 1913) 17 Cal. App. Dec. 286.

¹ *Nugent v. State*, (1833) 4 Stewart & Porter 72, 24 Am. D. 746; *State v. Ulrich*, (1892) 110 Mo. 350 19 S. W. 656.

² *People v. Henderson*, (1865) 28 Cal. 465; *People v. Casselman*, (1909) 10 Cal. App. 234, 101 Pac. 693. See also *People v. Eckert*, (1860) 16 Cal. 111; *People v. Hobson*, (1861) 17 Cal. 424.

³ California Penal Code, section 1053.

⁴ *People v. Lichtenstein*, (3rd App. Dist. Aug. 18, 1913) 17 Cal. App. Dec. 187; rehearing in Supreme Court denied Oct. 17, 1913.